IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 16, 2004

STATE OF TENNESSEE v. STEVEN M. STINSON

Appeal from the Criminal Court for Campbell County
No. 11,218 E. Shayne Sexton, Judge

No. E2003-01720-CCA-R3-CD - Filed July 29, 2004

The defendant, Steven M. Stinson, was convicted of three counts of rape of a child, a Class A felony. See Tenn. Code Ann. § 39-13-522(b). The trial court ordered a twenty-four-year sentence for each of the three convictions. Because two were ordered to be served consecutively, the effective sentence was forty-eight years. In this appeal of right, the defendant contends that the evidence was insufficient, that the trial court erred by ruling that his prior habitual motor vehicle offender conviction could be used for impeachment purposes, and that the sentence was excessive. Because of the misapplication of several enhancement factors, each of the three sentences is modified to a term of twenty-one years. Otherwise, the judgments are affirmed.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed as Modified

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JAMES CURWOOD WITT, JR., JJ., joined.

Steve McEwen, Mountain City, Tennessee (on appeal), and Charles Herman, Assistant Public Defender (on appeal and at trial), for the appellant, Steven M. Stinson.

Paul G. Summers, Attorney General & Reporter; Michelle R. Chapman, Assistant Attorney General; and Scarlett Ellis, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The victim, twelve-year-old VH,[1] testified that the defendant, her stepfather, placed his penis in her mouth at a time when the family resided in an area called Lick Creek. She stated that the defendant called her to the basement of the residence, opened the zipper of his pants, and did not ejaculate as he consummated the assault. The victim testified that later, after she had moved to a housing project with her mother, the defendant would often spend the night. She recalled that while in public housing, the defendant on at least three occasions reached under her panties in order to

[1] It is the policy of this court to identify minor victims of sex crimes by initial.

touch her "private," penetrating her vagina with his fingers. The victim testified that the touching occurred in a bedroom that she shared with her sister. She explained that she did not tell her mother about the defendant's behavior because she was fearful of being "taken away."

Kathy Stinson, the victim's mother, testified that the family moved to Lick Creek in 1994, when the victim would have been approximately four years old. She recalled that three years later, she and her own children moved to a governmental housing project apartment but that the defendant and his children, who had resided with them at Lick Creek, did not accompany them. Ms. Stinson testified that she never suspected that the defendant was sexually abusing the victim during the period of time she lived at either of the locations.

Dr. David McCray, the victim's physician, was asked to examine the victim "because of a concern about the possibility of sexual assault." He testified that his pelvic examination of the victim indicated that the condition of her labia and hymen were unremarkable and that there was no evidence of scarring or lesions. Dr. McCray did observe, however, that the victim's vaginal opening was "slightly widened" for a child her age. It was his opinion that his findings were consistent with her version of the offenses.

Todd Allen, a detective with the Jacksboro Police Department at the time of the investigation, testified that when he interviewed the defendant, who referred to the victim as "his blonde one out of the bunch," the defendant stated that he did not "think" that he placed his penis in the victim's mouth. The defendant also told the detective that he did not "believe [he] could do that" and did not "remember doing it." According to the officer, the defendant, who described the victim as "smart" and "honest," could not recall digitally penetrating the victim's vagina. The defendant, in an attempt to illustrate the intelligence of the victim, told the detective that he would occasionally give the victim money to hide so that he would not spend it.

Tony Arnold Byrd, who had known the defendant over approximately fifteen years as both a neighbor and a co-worker, testified that he drove the defendant to and from the police department for his interview with Detective Allen. According to Byrd, the defendant said after the interview, "I can't believe a six-year-old girl can remember that." When Byrd asked whether he had committed the offenses, the defendant replied, "No, I'm just talking to myself." He recalled that the defendant also said that "he was going to open [his brother-in-law's] head up like a can of worms and then he was going to kill hisself."

The forty-six-year-old defendant, a witness on his own behalf, testified that when he met Ms. Stinson, he had three children of his own, two sons and a daughter, from a prior marriage. It was his testimony that Ms. Stinson had only the victim, who was six months old at the time. The defendant recalled that before marrying Ms. Stinson in 2001 and divorcing her in 2002, he and various of his children lived with her and her two children for several years. They had one daughter together. The defendant testified that he and Ms. Stinson purchased a house in Lick Creek and lived there between 1994 and 1997. He recalled that all six of their children were living in the residence, with the three boys sharing one bedroom and the three girls sharing another. According to the defendant, he was

self-employed doing "remodeling work" in Knoxville and Oak Ridge and worked during the days seven days a week. He contended that the basement of the residence, approximately six by eight feet with a woodstove and blower used to heat the house, was too hot to occupy for any length of time. The defendant claimed that the entrance to the basement was a trapdoor in the bedroom he shared with Ms. Stinson and that the other room in the basement, unfinished and accessible only from the outside, was used for tool storage. The defendant insisted that he and Ms. Stinson always expected each of the children to behave modestly, requiring that they dress completely before leaving the bathroom after a bath.

The defendant testified that because they were not "getting along," Ms. Stinson made arrangements to move into governmental housing with her children. He recalled that he and his boys lived at an apartment in Long Holler and acknowledged that he occasionally spent the night with Ms. Stinson in her apartment. The defendant denied both having placed his penis in the victim's mouth and having touched her genitals. He also denied having made any statements to Tony Byrd after his interview with police. The defendant further explained that it was unlikely that the victim would have entered the basement at the Lick Creek residence because she did not like dirt and was a "very neat, clean little lady." While acknowledging that he traveled to Indiana after his police interview and that after the criminal charges he was returned to this state by law enforcement officers, he explained that he had left the jurisdiction only because it was his oldest granddaughter's first birthday.

Christopher Lee Stinson, the defendant's son from a prior marriage, testified that the victim never expressed any fear of the defendant and that her attitude towards him did not change. He claimed that he never observed the defendant touch the victim inappropriately and testified that the victim never mentioned any inappropriate behavior.

Elizabeth Ann Cooper, the defendant's daughter by a prior marriage, described the defendant's relationship with the victim as a normal father-daughter relationship. It was her testimony that the victim had never appeared to be afraid of the defendant.

The defendant was charged with a total of four counts of rape of a child, one count for the incident occurring while the victim resided at Lick Creek and three counts for the incidents occurring while the victim resided in the housing project. The jury returned guilty verdicts on all counts, but the trial judge, acting as thirteenth juror, see Tenn. R. Crim. P. 32(f), dismissed the third conviction from the housing project period.[2]

I

Initially, the defendant contends that the evidence was insufficient to support his convictions. Specifically, he argues that the convictions depend entirely upon the testimony of the victim, which

[2]The proper remedy would have been the grant of a new trial on this charge. See Tenn. R. Crim. P. 32(f). The state, however, has not raised this issue on appeal.

was "extremely vague with little or no detail[]." The state disagrees, pointing out that witness credibility is within the province of the jury.

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956). Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

Rape of a child is defined as "the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-522(a). "'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required[.]" Tenn. Code Ann. § 39-13-501(7).

The indictment in this case charged the defendant with one count of rape of a child occurring between June 1994 and April 1997 (the Lick Creek period) and three counts occurring between April 1997 and June 2001 (the housing project period). The victim testified that during the period they lived in the Lick Creek area, the defendant placed his penis in her mouth while in the basement of the family residence. Born in June of 1990, she would have been between the ages of four and seven between 1994 and 1997. The victim also testified that later, while her family was living in the projects, the defendant digitally penetrated her vagina in her bedroom. While she testified that this happened on at least three occasions, she specifically identified only two instances of penetration. There were a total of three convictions for rape of a child. Election among offenses has not been presented as an issue. The defendant questions the adequacy of the proof only on credibility grounds. It was the prerogative of the jury to accredit the victim's testimony and to reject that of any other witness. See Tenn. Const. art. I, § 19 (providing that "the jury shall have a right to determine the law and the facts, under the direction of the court . . . in all criminal cases"); State v. Summerall, 926 S.W.2d 272, 275 (Tenn. Crim. App. 1995). Additionally, there was some physical evidence to corroborate the victim's claims. Dr. David McCray testified that his physical examination of the victim revealed that her vaginal opening was wider than it should have been for a child of her age and development. It was his opinion that her physical condition was consistent with the circumstances of the offenses she related. The jury was entitled to make inferences from the

defendant's statements to Detective Allen and Tony Byrd. While not overwhelming, the evidence was sufficient to support each of the three convictions.

II

Next, the defendant contends that the trial court erred by ruling that his three prior convictions for violation of the Habitual Motor Vehicle Offender Act were admissible for impeachment purposes. The state argues otherwise.

Rule 609 of the Tennessee Rules of Evidence establishes that the credibility of the defendant may be attacked by presenting evidence of prior convictions so long as the convictions are punishable by death or imprisonment in excess of one year or for a crime involving dishonesty or false statement. The rule requires the state to provide advance written notice of the conviction to the defense and that the trial court determine whether the probative value outweighs any unfair prejudice before the evidence may be introduced. See Tenn. R. Evid. 609(a)(3). Also, no more than ten years may have lapsed between the commencement of the prosecution and the defendant's release from confinement on a prior conviction. Tenn. R. Evid. 609(b). In balancing the probative value on credibility against the unfair prejudicial effect on the substantive issues, the trial court must consider whether the prior conviction is the same or similar to that at issue. State v. Mixon, 983 S.W.2d 661, 674 (Tenn. 1999). The admission of prior convictions cannot be the basis for reversal unless the trial court has abused its discretion. State v. Blanton, 926 S.W.2d 953, 960 (Tenn. Crim. App. 1996).

In our view, the trial court did not abuse its discretion by determining that the convictions were admissible for impeachment purposes. Violation of the Habitual Motor Vehicle Act is a Class E felony. See Tenn. Code Ann. § 55-10-616(b). None of the prior convictions were more than ten years old. Because they bore no resemblance to the crime at issue, the danger of unfair prejudice was minimal. The defendant is not entitled to relief on this issue.

III

As his final issue, the defendant contends that his sentences are excessive and that the trial court erred by ordering consecutive service. The state disagrees.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In calculating the sentence for a Class A felony conviction, the presumptive sentence is the midpoint within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement factors but no mitigating factors, the trial court shall set the sentence at or above the midpoint. Tenn. Code Ann. § 40-35-210(d). If there are mitigating factors but no enhancement factors, the trial court shall set the sentence at or below the midpoint. Id. A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence should then be reduced within the range by any weight assigned to the mitigating factors present. Id.

Initially, there was no testimony presented at the sentencing hearing. After hearing arguments of counsel, the trial court found the following enhancement factors applicable: (2) that the defendant has a previous history of criminal convictions in addition to those necessary to establish the appropriate range; (5) that the victim was particularly vulnerable because of age; (8) that the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement; (12) that the felony involved the threat of death or bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or bodily injury; (14) that the felony was committed while the defendant was on release on community corrections; and (16) that the defendant abused a position of private trust. See Tenn. Code Ann. § 40-35-114(2), (5), (8), (12), (14), (16) (Supp. 2002). In doing so, the trial court stated that it was assigning little weight to enhancement factor (5). In mitigation, the trial court found that the defendant had served honorably in the military for nine years. See Tenn. Code Ann. § 40-35-113(13). It then set each of the defendant's sentences at twenty-four years, four years above the midpoint.

The defendant concedes that the trial court properly applied enhancement factors (2), that the defendant has a previous history of criminal convictions, and (16), that the defendant abused a position of private trust. He argues that enhancement factor (5), that the victim was particularly vulnerable because of age, is inapplicable because there is no supporting evidence in the record. The state responds that the victim's vulnerability was apparent in the difficulty she experienced during her testimony. Our supreme court has ruled that enhancement factor (5) "relates more to the natural physical and mental limitations of the victim than merely to the victim's age." State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993). Thus, the factor may be used only "if the circumstances show that the victim, because of his age or physical or mental condition, was in fact 'particularly vulnerable,' i.e., incapable of resisting, summoning help, or testifying against the perpetrator." Id. Although the victim was young and she demonstrated emotion during her testimony, there is no other evidence

to support a finding that she was particularly vulnerable. Under the Adams rule, enhancement factor (5) did not apply.

Next, the defendant contends that the trial court erred by applying enhancement factor (8), that the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement. Our supreme court has held that enhancement factor (8) may be applied to rape convictions because rape is frequently committed for reasons other than sexual pleasure or excitement. See Arnett, 49 S.W.3d at 261–62; State v. Kissinger, 922 S.W.2d 482, 490 (Tenn. 1996); State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993). The critical inquiry in determining the applicability of this factor "is the determination of the defendant's motive for committing the offense." Arnett, 49 S.W.3d at 261 (emphasis in original). Further, "[t]he motive [for commission of the offense] need not be singular for the factor to apply, so long as [the] defendant is motivated by [a] desire for pleasure or excitement." Kissinger, 922 S.W.2d at 490. "[P]roper application of factor [(8)] requires the [s]tate to provide additional objective evidence of the defendant's motivation to seek pleasure or excitement through sexual assault." Arnett, 49 S.W.3d at 262. Such evidence includes, but is not limited to, sexually explicit remarks and overt sexual displays, such as fondling and kissing a victim, or "remarks or behavior demonstrating the defendant's enjoyment of the sheer violence of the rape." Id. In this case, the trial court failed to address the specific facts supporting application of the factor. After a thorough review of the record, this court has been unable to find specific evidence, as is required, that the defendant was motivated to commit the offenses by a desire for pleasure or excitement. Thus, factor (8) cannot be used to enhance the sentences.

The defendant next argues that the trial court erred by applying enhancement factor (12), that the felony involved the threat of death or bodily injury to another person and that the defendant had previously been convicted of a felony resulting in death or bodily injury. Specifically, the defendant contends that the proof of penetration in this case was "scant" and that there was no evidence of actual or threatened bodily injury. "'Bodily injury'" includes a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty[.]" Tenn. Code Ann. § 39-11-106(a)(2). Oral and vaginal penetration of a child victim presents a danger of both physical and psychological injury. See State v. Arnett, 44 S.W.3d 250, 260 (Tenn. 2001) ("[W]e recognize that . . . victims of rape[] must surely experience mental trauma . . . ."); State v. Edward A. Hudson, No. 03C01-9601-CC-00011 (Tenn. Crim. App., at Knoxville, Sept. 19, 1997) (painful tearing of hymen consistent with digital vaginal penetration of six-year-old victim). It is our conclusion that the trial court did not err by applying enhancement factor (12).

Finally, the defendant asserts that the trial court erred by enhancing his sentences on the basis of factor (14), that the felony was committed while the defendant was on release. He argues that because the dates of his prior offenses are unclear, the record does not support a finding that he was on release at the time of their commission. Although the presentence report indicates that the defendant was on community corrections from 1997 to 1998 and from 2000 to 2002, the victim lived in a housing project with her mother from 1997 until 2001. She testified that sometime during that period the defendant digitally penetrated her vagina more than three times. Whether the defendant

was on community corrections at those times is not discernible from the record. Accordingly, enhancement factor (14) should not have been applied.

The defendant also submits that the trial court erred by failing to apply mitigating factor (1), that his conduct neither caused nor threatened serious bodily injury. See Tenn. Code Ann. § 40-35-113(1). For the same reasons that enhancement factor (12) under our Act is applicable, however, mitigating factor (1) is inapplicable.

In summary, enhancement factors (2) that the defendant has a prior history of criminal convictions or behavior; (12) that the felony involved the threat of death or bodily injury to another person; and (16) that the defendant abused a position of private trust are applicable to each of the defendant's convictions in this case. The defendant's military service stands as the sole mitigating factor. A Range I sentence for a Class A felony is fifteen to twenty-five years. Tenn. Code Ann. § 40-35-112(a)(1). The midpoint in the range is twenty years. In our view, a twenty-one-year sentence on each conviction for each offense would be appropriate under our sentencing act.

The United States Supreme Court's recent opinion in Blakely v. Washington, 542 U.S. ___, 124 S. Ct. 2531 (2004), however, calls into question the continuing validity of our current sentencing scheme. In that case, the Court, applying the rule in Apprendi v. New Jersey, 566 U.S. 466, 490 (2000), struck down a provision of the Washington sentencing guidelines that permitted a trial judge to impose an "exceptional sentence" upon the finding of certain statutorily enumerated enhancement factors. Id. The Court observed that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at **13-14 (emphasis in original). Finally, the Court concluded that "every defendant has a right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." Id. at *31 (emphasis in original).

It does not appear that the application of enhancement factor (2) would violate the rule established in Apprendi because factor (2) is based upon prior criminal convictions. Further, factor (16) was conceded to be applicable by the defendant. See Apprendi, 566 U.S. at 490. Any error by its application, under the circumstances of his concession coupled with the proof at trial, would qualify as harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967). Factor (12) could not be applied under the Blakely rule. In our view, the decision in Blakely requires the presumptive minimum absent any enhancement factors. At least one factor applies under the Blakely standard. Probably two factors apply. The majority opinion of the Supreme Court confirms the authority of trial judges to apply mitigating factors. Accordingly, a sentence modification to twenty-one years on each conviction under the Blakely rule is entirely appropriate. It is our conclusion, therefore, that the sentences would be the same under either rule.

The defendant also claims that the trial court erred by ordering consecutive sentencing. Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case our supreme court ruled that aggravating circumstances must be present before

placement in any one of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution:

> [C]onsecutive sentences should not routinely be imposed . . . and . . . the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

Taylor, 739 S.W.2d at 230. The Sentencing Commission Comments adopted the cautionary language. Tenn. Code Ann. § 40-35-115. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria[3] exist:

> (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
> (2) The defendant is an offender whose record of criminal activity is extensive;
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
> (6) The defendant is sentenced for an offense committed while on probation;
> (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

The length of the sentence, when consecutive in nature, must be "justly deserved in relation to the seriousness of the offense," Tenn. Code Ann. § 40-35-102(1), and "no greater than that deserved" under the circumstances, Tenn. Code Ann. § 40-35-103(2); State v. Lane, 3 S.W.3d 456 (Tenn. 1999).

In ordering consecutive service, the trial court in this case stated as follows:

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[3]The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

> I think the [s]tate has shown sufficient evidence to support discretionary consecutive sentencing by showing that these are two statutory offenses involving sexual abuse of a minor. In particular looking at the time span of the defendant's undetected sexual activity, we're talking about the possibility of some . . . eight years from the time that the first act may have occurred, until the time this particular defendant was indicted. And more than one occasion having occurred. Mentioning already that there has been a family relationship between the victim and the defendant, I don't think there's any question that the consecutive sentencing is supported.

In our view, the trial court correctly determined that consecutive sentencing was appropriate under Code section 40-35-115(b)(5). The defendant was convicted of multiple offenses involving sexual assault of a minor. The offenses spanned a number of years and the defendant was the stepfather of the victim. Under these circumstances, consecutive service of two of the three sentences, as directed by the trial court, is appropriate.

Accordingly, the judgments of the trial court are affirmed as modified. The effective sentence is forty-two years.

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GARY R. WADE, PRESIDING JUDGE